

Influence of International Law on Australian Common Law

- Viewed as a **legitimate influence** on the common law (*Mabo*)
- Dualist approach in Australia: implementation is required before the treaty will have effect
 - Only interpret in accordance with the treaty if there is an ambiguity
- Issue whether there is a **presumption that parliament intends to legislate in accordance with Australia's international obligations**

Transformation and Common Law Adoption

Chow Hung Ching v R

- Dixon J argued that *"international law is not a part, but is one of the sources of English common law."*
 - A "universally recognised principle" of international law would influence the common law

Mabo v Qld

- Brennan J held that *"international law is a legitimate and important influence on the development of the common law."*
 - Particularly in regard to universal human rights and when the expectations of the international community accord with the contemporary values of Australian society
 - PROPORTIONALITY TEST: The international rule influencing the common law must satisfy a proportionality test; *"if the rule were to be overturned, the disturbance to be apprehended would be disproportionate to the benefit that would arise."* And, the rule to be changed cannot be an *"essential doctrine."*

Influence of Treaties on the Common Law: *Has the treaty been implemented into Australian law?*

- Treaties are not self-executing and the courts require a positive act of legislative implementation in order for the treaty to have been incorporated into domestic law.

Nulyarrima v Thompson

FACTS: it was alleged the 10 point plan was a form of genocide under the Genocide Convention

- It was held that **an Act approving ratification, without actually implementing the convention, was not incorporation;**
- Wilcox J argued that ratification does not affect Australian law until implementing legislation is enacted;
 - Courts should refrain from deciding a case on criminal customary international law
- Merkel J (in dissent) adopted the 'source view' of incorporation which was pronounced by Dixon J in *Chow Hung Ching v R*.

Tien v MIMA

- The ministerial statement evidencing a contrary intention was ineffective; it was too general and **must relate to particular provisions of particular treaties.**

Dietrich v R (1992)

- Held that *"ratification of the ICCPR as an executive act has no direct legal effect upon domestic law; the rights and obligations contained in the ICCPR are not incorporated into Australian law unless and until specific legislation is passed implementing the provisions."*
 - AMBIGUITY TEST: The court suggested that **if the legislation is ambiguous or the common law is uncertain, then "judges may look to an international treaty which**

Australia has ratified as an aid to the explication and development of the common law.”

Teoh (1995)

FACTS: Minister has powers to cancel visa. Argued Mr Teoh had a legitimate expectation that a decision-maker exercising discretionary power would ensure and consider Australia’s international obligations.

- Held that ratification is a statement to the international community and domestic constituency that a legitimate expectation existed that administrative **decision makers will act in conformity with the convention absent statutory or executive indications to the contrary e.g. ministerial statements**
- **Ratification does not create an enforceable right but a procedural presumption. The former, requires a positive legislative act to implement the treaty (*Nulyarrima v Thompson*).**
 - Affirmed the *Dietrich* ambiguity test, although they found no ambiguity, the court commented that;
 - **The rejected a narrow conception of ambiguity in these circumstances: “if the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail.”**
 - Although, this is a **cautious approach** and this will depend on whether;
 - The nature of the relevant provision;
 - The extent to which it has been accepted by the international community
 - The purpose which it is intended to serve and
 - The relationship between the instrument and the existing principles of domestic law...yield to such an interpretation.

Presumption: Does parliament intend to legislate in conformity with Australia’s treaty obligations?

Polities v Cth

- Dixon J held that “*it is a rule of construction that unless a contrary intention appears, general words occurring in a statute are to be subject to the established rules of international law.*”
 - However parliament can legislate in breach of international law

Teoh

- Recognised a legislative intent to give effect to Australia’s obligations

Al Kateb

- McHugh J casts doubt on the statutory interpretation principle that parliament intends to legislate in accordance with international law, yet follows the rule regardless as he reasons it has already entrenched

Malaysian Declaration Case (2011)

FACTS: Refugees Convention was held to be impliedly implemented in the Migration Act by reference to ‘protections obligations’ in s36.

- Held that;
 - An Act must be read compatibly with Australia’s international obligations

- An assurance that Malaysia would uphold human rights is insufficient, required actual legal obligations.

Plaintiff M70

- Demonstrated that the courts are willing to construe terms in statute in light of principles of international law where those terms are also contained in similar treaties to which Australia is a signatory;
 - E.g. **terms such as ‘refugee’ and ‘persons seeking asylum’ in s198A of the Migration Act were interpreted in light of the Refugees Convention**

CPCF v Minister for Immigration and Citizenship

- Maritime Powers Act gave powers to detain and remove persons to a third country
 - Interpreted in accordance with international law principles

The Queen v Tang

- Person convicted for slavery; the courts interpreted the definition of slavery in accordance with international conventions (note: slavery is a norm of jus cogens)

Law of State Responsibility

Articles on State Responsibility for Internationally Wrongful Acts

- Art 1: *“every internationally wrongful act of a state entails the international responsibility of that state.”*

Elements:

Art 2: (1) whether the conduct consisting of an act or omission, is (2) attributable to the state under international law and (3) constitutes a breach of an international obligation of a state.

- 1) *Whether the act or omission is attributable to the state?*
- 2) *Whether the act or omission violates a rule of international law?*